PUBLIC PROSECUTOR

v.

MUTHU LINGAM

HIGH COURT MALAYA, KUALA LUMPUR
NH CHAN J
[FT CRIMINAL APPEAL NO. 1 OF 1984]
2 OCTOBER 1985

CRIMINAL LAW AND PROCEDURE: *Criminal breach of trust - Section 409 of Penal Code - Sentencing policy.*

The respondent was a sale representative of Wengkal Sdn. Bhd. and was given a cash cheque for RM100,000 by a potential client. The respondent was supposed to open an account with Wengkal in the client's name. Instead the respondent paid the money into his own savings account and committed the offence of criminal breach of trust by an agent acting as such under s. 409 of the Penal Code. The respondent was charged before the Sessions Court and was convicted and sentenced to a day's imprisonment and fined RM3,000 in default six months' imprisonment. The Public Prosecutor is now appealing against the inadequacy of the length of the custodial sentence.

Held:

[1] The two factors which operate in a case of this kind are retribution and deterrence. Public interest demands that crimes of this sort must be punished severely and discouraged.

[2] It is in the interest of the public and it is in keeping with the intention of the legislature as to the seriousness of the offence under s. 409 of the Penal Code that a sentence which is appropriate in this case should be one of some severity.

[3] The sentence of one day was increased to 3 years and the fine remained the same.

[Appeal allowed.]

Cases referred to:
R. v. Davies [1978] 67 Cr App R 207, 210
R. v. Pugh and Rendell [1981] Crim LR 270
P.P. v. Khairuddin [1982] 1 MLJ 331

Legislation referred to:
Penal Code, ss. 408, 409

For the appellant/public prosecutor - Tan Hock Chuan
For the respondent - Karpal Singh; M/s. Karpal Singh & Co.

JUDGMENT

NH Chan J:

Muthu Lingam was a sales representative of Wengkal Sdn. Bhd. Wengkal is a firm which trades in commodities. On 12 November 1981 Tan Sri Haji Mohd. Noah bin Omar gave his wife, Puan Sri Siti Amirah bt. Parawira Kasuma, a cash cheque for RM100,000 so that she could use the money to trade in commodities with Wengkal. The money was given in the office of Tan Sri Haji Noah. Muthu Lingam was there. Puan Sri Siti Amirah and Muthu Lingam then went to the United Malayan Banking Corporation branch office at Jalan Tun Perak to

cash the cheque. She gave the money to Muthu Lingam so that he could open an account with Wengkal in her name. Instead, Muthu Lingam paid the money into his own savings account with the Hong Kong and Shanghai Bank branch office at Jalan Bukit Bintang. By so doing, he has committed the offence of criminal breach of trust by an agent acting as such under s. 409 of the Penal Code. The money was eventually put into the client's account of Wengkal but this was not done until some eight days later on 20 November 1981. The money was only put into Puan Sri Siti Amirah's account after she had discovered that the RM100,000 was not paid into her trading account with Wengkal. It was only after the discovery that Muthu Lingam, on 20 November 1981, caused an account to be opened for Puan Sri Siti Amirah as a new client of Wengkal.

Subsequently, he was charged before the Sessions Court at Kuala Lumpur for the offence of criminal breach of trust by an agent acting as such under s. 409 of the Penal Code. He was convicted on 3 January 1984 and sentenced to a day's imprisonment and fined RM3,000 in default six months's imprisonment. It is against the inadequacy of the length of the custodial sentence that the Public Prosecutor is now appealing.

What then is the right sentencing policy for this type of crime? "A good deal depends upon the concept of what is necessary." - said Lawton LJ in *R. v. Davies* [1978] 67 Cr App R 207, 210. He said:

> There are of course the classical considerations relevant to all sentences: retribution, deterrence, prevention and rehabilitation. .... At one time it was fashionable to suggest that retribution ought not to enter into sentencing policy. That opinion I think, is not held as strongly now as it was a few years ago. The reason is manifest: the Courts have to make it clear that crime does not pay and the only way they can do so is by the length of sentences. Sentences show the Court's disapproval, on behalf of the community, of particular types of criminal conduct.

The retributive element is an important one in the present case.

One shudders to think of what might have happened to the money had Puan Sri Siti Amirah not become suspicious. In *R. v. Pugh and Rendell* [1981] Crim LR 270, it was held that "dishonesty by persons in positions of trust was all too common, and the only way to stop it was by custodial sentences. Offenders in this class of case had ample funds from which to pay fines, and would regard being fined as one of the risks of the business." In my judgment, the retributive element is very strong in this case.

I now look at the deterrent aspect of sentencing policy. It has been said that when a person is minded to commit criminal breach of trust he is not likely to be deterred by the fact that he may get five years rather than three years or six years rather than four years. "That is right," said Lawton LJ in *Davies*, at p. 210, "but what has got to be maintained is this; be they cashiers, milk roundsmen, foremen or solicitors if they are in breach of trust they will be punished and punished very severely. ... Therefore it must be made clear that anyone breaking trust must expect a severe sentence." With those words, I agree.

In *PP v. Khairuddin* [1982] 1 MLJ 331, Azmi J (as he then was) said, at p. 332:

> Public interest demands, that cases of this nature involving persons in positions of trust, particularly in financial institutions, must be dealt with severely, in the hope that would-be offenders would be deterred. Until it is understood by such people that the normal punishment for helping themselves to their employers' money is to be sent to prison, there will continue to be officials in commercial and cooperative banks and similar institutions, prepared to pilfer the till.

Those remarks were made in a case of criminal breach of trust by a servant under s. 408 of the Penal Code. The accused in that case was a bank officer and Azmi J, after taking into account the fact that he was a first offender and that he had pleaded guilty, enhanced his sentence of a day's imprisonment to 18 months in addition to the fine of RM2,000.

The charge in the present case is far more serious. Whereas, the offence under s. 408 carries a maximum term of seven years' imprisonment, the offence under s. 409 carries a maximum punishment of 20 years' imprisonment plus liability to fine. Section 409 says:

> 409. Whoever, being in any manner entrusted with property, or with any dominion over property, in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney, or agent, commits criminal breach of trust in respect of that property, shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to fine.

This is because no criminal could be in greater breach of trust than a public servant, banker, merchant, factor, attorney or agent, acting as such.

In my judgment, the two factors which operate in a case of this kind are retribution and deterrence. Public interest demands that crimes of this sort must be punished severely and discouraged.

I have looked carefully at this matter and I have taken into account all the points made by Mr. Karpal Singh. I have borne in mind the fact that he is a first offender, but then, the solicitor in Davies was also a first offender and the bank officer in *Khairuddin* was also a first offender. I have also not forgotten that in the present case, fortunately, Puan Sri Siti Amirah did not lose her money.

When dealing with a case like the present one, this Court has (to borrow the words of Lawton LJ) "to remember what happens in other kinds of cases and keep a sense of proportion." (Per Lawton LJ in *Davies* at p. 210). It is in the interest of the public and it is in keeping with the intention of the legislature as to the seriousness of the offence under s. 409 of the Penal Code that a sentence which is appropriate in this case should be one of some severity.

I, therefore, enhance the sentence of one day's imprisonment to three years. Accordingly the appeal of the Public Prosecutor is allowed. The fine is to remain as it is.

Also found at [1986] 1 CLJ 78